

Before the
LIBRARY OF CONGRESS
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Washington, D.C. 20540

In re: Determination of Statutory)
License Terms and Rates for Certain) No. 96-5
Digital Subscription Transmissions) CARP DSTR
of Sound Recordings)

MUZAK's Replies in Support of Its Motions to Compel Production by RIAA

Muzak, L.P., by its undersigned attorneys, herein replies to the January 8, 1997 papers filed by the RIAA in opposition to Muzak's three motions to compel, which were filed on December 27, 1996. In addition, Muzak hereby joins in the replies being filed today by DCR and DMX Inc. in support of their motions to compel.

Scope of Work of Experts is Discoverable

Muzak's first motion asked the Copyright Office to compel the RIAA to produce all documents underlying statements made by two experts for the RIAA *as part of their direct testimony* concerning the scope of their work on this matter.

As Muzak explained in its motion, Muzak's requests were properly limited to statements contained in the witnesses' direct testimony, and seek only those documents underlying those statements.

In opposition, the RIAA admits that documents exist that are "arguably responsive" to these requests (i.e., the written instructions the experts received from the RIAA support or

underlie the statements they made in their direct testimony about their scope of work). Moreover, it admits that it is obligated to produce all documents that underlie its experts' direct testimony (citing the Copyright Office's November 27, 1996 Order). Notwithstanding these admissions, the RIAA tries to avoid its obligation by arguing that its witnesses' assertions about the scope of their work on this matter are not "substantive factual assertions."¹

Anticipating this defense, Muzak carefully explained in its motion why the experts' scope of work was important to this arbitration. Unfortunately, the RIAA failed to address this issue in any meaningful way. For example, the RIAA did not respond to Muzak's claim that the validity of the opinions reached by experts Wilkofsky and Gerbrandt depends on the strength of the analogy they make between digital music subscription services and cable television programming, which depends, in turn, on the scope of their review.

Contrary to the RIAA's assertions, statements concerning the scope of work performed by the RIAA's experts as part of their direct testimony do constitute "substantive factual assertions." If the RIAA did not want to produce documents underlying these statements, it should

¹ In a footnote, the RIAA also opposes the production of responsive documents on grounds they are "similar in nature to other background materials . . . such as a witness' resume," and on grounds that the documents might contain information protected by the attorney work product doctrine. Clearly, the documents at issue here are not at all analogous to a witness' resume -- which exists separate and apart from the arbitration, makes no reference to the arbitration or to the issues to be decided therein. Moreover, the RIAA's claim that these documents are protected by the attorney work product doctrine is unfounded. In making this claim of privilege, the RIAA ignored Muzak's argument that the doctrine does not apply to materials provided a testifying expert. See, e.g., In Re Air Crash at Stapleton International Airport, 702 F. Supp. 1442, 1444 (D. Colo. 1988) ("[T]he privilege normally afforded attorney work product gives way to the realities of expert preparation in regard to materials presented to an expert for consideration in forming an opinion to which he will testify at trial. . . . Accordingly, all materials possessed by an expert in relation to a case in which he is expected to testify are discoverable.") While Muzak recognizes this arbitration is not governed by the Federal Rules of Civil Procedure, Muzak does believe that both the FRCP and the rules of the Copyright Office seek to advance a common goal -- the discovery of truth. For that reason, and because courts applying the FRCP have long wrestled with the doctrine asserted by the RIAA, Muzak respectfully suggests that federal case law can provide useful guidance to the Copyright Office on this issue. Finally, to the extent the RIAA's claim of privilege is deemed valid, the RIAA has not explained why it cannot redact out privileged matter.

not have included the statements in its direct case. Having included them, the RIAA should be required to produce all underlying documents.

Documents Regarding Marketplace Negotiations are Discoverable

Muzak's second motion centers around a fact that all the parties to the arbitration recognize -- marketplace negotiations have already established a 2% digital performance royalty fee, and documents surrounding these negotiations have likely been reviewed by witnesses testifying in this case. The RIAA tries to claim that these documents do not underlie any statements in its direct case. In reality, both Jason Berman and expert David Wilkofsky make explicit reference to "marketplace negotiations" in their direct testimony.

David Wilkofsky, one of the RIAA's experts, stated in his direct testimony that he identified what the royalty fees would be if they were "determined by marketplace negotiations." When asked to produce all documents "*underlying*" this statement (including any documents concerning the only marketplace negotiation over digital performance rights), the RIAA responded only that the remainder of Wilkofsky's report "*explains*" the statement. Clearly, the RIAA's response is not adequate. Muzak is entitled to know whether any other documents underlie the statement. In other words, did Mr. Wilkofsky review any documents pertaining to "marketplace negotiations" (including the negotiations that resulted in a 2% rate) prior to making the statement? If he did, then the RIAA must more adequately explain its blanket claim that, despite their apparent relevance, these documents do not underlie his testimony and were not relied upon by him in making the statements.

Similarly, Jason Berman states in his direct testimony that the RIAA has asked for a 41.5% rate based on "negotiations that take place in the free marketplace between willing buyers and

willing sellers.” In response to a request for all supporting documents, the RIAA claimed that Mr. Berman was relying solely on his “general knowledge of the industry and the testimony of other RIAA witnesses.” Curiously, in its opposition papers, the RIAA now asserts that Mr. Berman’s statement was supported only by his “knowledge and experience,” and apparently drops as support the “testimony of other witnesses.” The RIAA’s claim that only Mr. Berman’s knowledge and experience underlies his testimony cannot stand. At the least, Muzak is entitled to know whether Mr. Berman actually reviewed any documents related to the negotiated 2% rate. If he did review them, the RIAA should provide a more thorough explanation as to why these documents do not underlie his statement or were not relied upon by him in making the statement.

Berman’s Testimony Before House Subcommittee is Discoverable

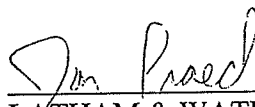
Muzak’s last motion to compel is based on the RIAA’s refusal to produce documents concerning statements made by Jason Berman before a House judiciary subcommittee. As Muzak noted in its underlying motion, Mr. Berman’s 1993 statement is part of the 1993 legislative history surrounding the legislation proposed to create a performance right that was referenced in RIAA’s direct case in Hilary Rosen’s testimony (page 8). Mr. Berman’s testimony was also referenced in the House and Senate Reports she directly incorporated into her testimony.

In opposition to this motion, the RIAA erects a straw man defense. It claims that it should not be required to produce “documents that underlie every statement in the legislative history of the [Digital Performance Rights Act] merely because it references the legislative history somewhere in its Direct Case.” Muzak’s motion is far more narrow than the RIAA cares to admit. In reality, Muzak is asking for nothing more than the production of documents that underlie *statements made by the RIAA’s own representatives* and that are contained in, cited by or otherwise

referenced in the body of its direct case. The RIAA does not dispute that Jason Berman made statements concerning Time Warner and Sony's decisions to invest \$20 million in DCR and to negotiate a 2% performance rate with DCR. Nor does it dispute that these statements were made in his capacity as a representative for the RIAA. It also does not dispute that his statements are part of the legislative history surrounding the Digital Performance Rights Act, and that Ms. Rosen cited to this legislative history in her direct case. Clearly, the RIAA cannot be permitted to circumvent its obligation to produce documents related to its direct case merely by artfully limiting the text of its direct case to citations to outside sources that themselves contain statements made by representatives of the RIAA itself.

For all the foregoing reasons, Muzak respectfully requests that its three motions to compel be granted.

Respectfully submitted,



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Dated: January 15, 1997

*Application to practice in the District of Columbia pending

CERTIFICATE OF SERVICE

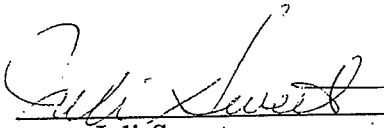
I, Juli Sweet, do hereby certify that MUZAK's Replies in Support of its Motions to Compel Production by RIAA was served by facsimile on this 15th day of January, 1997, to the following:

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